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IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 390.

INEZ M. JAMISON, WILLIAM N. DYKMAN AND MARTIN E. GOETZINGER, Executrix and Executors of WILLIAM A. JAMISON, deceased,

Petitioners,

AGAINST

VALENTIN ENCARNACION,

Respondent.

RESPONDENT'S BRIEF.

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VALENTIN ENCARNACION,

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RESPONDENT'S BRIEF.

On Certiorari to the Supreme Court of the State of New York.

Statement.

The action was brought in the Supreme Court, Kings County, against an employing stevedore to recover damages for an assault upon plaintiff, a longshoreman, made by the foreman of the defendant to whose orders plaintiff was subject.

The assault was made within the scope of the foreman's employment and in furtherance of the defendant's business.

At the end of the whole case, at trial term, defendant, at folio 134 moved as follows:

> "Mr. Hill: I move to dismiss the complaint on the ground that it appears affirmatively

that the act complained of was that of a fellow servant acting outside the scope of his employment.

The Court: Motion denied.

Mr. Hill: Exception."

There was neither exception to the charge of the learned trial Justice or request for additional instructions by counsel for either party.

The jury found a verdict for the plaintiff in the sum of Twenty Five Hundred ($2500) Dollars (fols. 31-33) upon which judgment was entered (fol. 35).

The Appellate Division, approving the facts found by the jury, reversed the judgment upon the law and dismissed the complaint upon the sole ground that the plaintiff and the foreman, to whose orders he was subject, were fellow servants.

In so doing, the Appellate Division was guided by the rule established in New York in the case of *Gabrielson* v. *Waydell,* 135 N. Y. 1, decided by a divided Court, with strong dissent, in 1892.

Pending the appeal to the Court of Appeals, it having been brought to the attention of the Court, that William A. Jamison, the sole defendant, had died while the appeal to the Appellate Division was *sub judice* in the latter Court, and, in such situation, under the Civil Practice Act, the action not abating, the Court of Appeals substituted, by proper amendment, the petitioners in place and stead of the said William A. Jamison and ordered that the action proceed against them.

The Court of Appeals reversing the Appellate Division and reinstating the judgment of trial term said: "Reading *Gabrielson* v. *Waydell*

(supra) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law, has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery but should hold broadly *that Congress, in doing away with the fellow servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision and that it is no longer controlling. We cannot, with a fair countenance, say that a master is now liable to his servants for personal injuries due to a careless foreman but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master*" (fols. 240-241).

In thus deciding, the Court neither construed the Federal Employers Liability Act nor extended the terms of that act to include assault.

On the remittitur of the Court of Appeals the judgment of trial term for $2,638.05 was reinstated and affirmed as of the original date of entry and judgment for costs in the Appellate Division and Court of Appeals amounting to $325.55 was awarded and entered.

This Court on October 21, 1929, granted a Writ of Certiorari to the Supreme Court of the State of New York the Court in which the record was filed and ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, be treated as though filed in response to such writ.

Facts.

The facts are meagre but were sufficient to satisfy the jury and the Appellate State Courts, that the plaintiff a longshoreman while in the employ of the defendant, and subject to the orders of the foreman, was assaulted by the latter and the injuries were inflicted while the foreman was acting within the scope of his employment and in furtherance of the master's business.

The assault is testified to by the injured man as follows (45):

"Q. What kind of work were you doing? A. Stevedore.

Q. What kind of stevedoring work were you doing? A. Everything.

Q. Were you loading or unloading barges? A. Loading barges.

By the Court:

Q. What did he say? A. He called me and said, 'Hurry up, you black bastard son-of-a-bitch.'

By Mr. Castellano:

Q. And what did you say to him? A. I said, 'Leave me alone today. I am here for four or five years and I can do the work and I know what work to do.'

Q. And what did he say then? A. He give me a punch and I fall down.

Q. Where did he punch you? A. Right in my eyes.

Q. Right over your eyes? A. Yes, sir.

Q. Which eye? A. Right here (indicating) and I fall down to the floor."

The gang of which the plaintiff was one, was loading a barge which lay in the East River at

the foot of Jay Street, Brooklyn at the defendant's place of business. The plaintiff also testified:

> "Q. On May 19, 1925, were you working on barge No. 3? A. Yes.
>
> Q. And was that barge in the river? A. Yes, sir.
>
> Q. At the foot of Jay Street, Brooklyn? A. Yes" (fol. 42).

POINT I.

A master is liable for the tortious acts of his servant, when done in the course of his employment.

This Court, as early as the case of *Philadelphia & Reading R. R.* v. *Derby*, 14 Howard 468, gave expression to the general principle in the following language:

> "The rule of 'respondent superior' or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of the servant's employment."

Some years later in *Denver and Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 610, it was applied in an illegal and wrongful assault upon the person of one Harris made by the defendant corporation "acting by its agents and servants." The Court

held the liability of the corporation, *civiliter*, to be the same as though it were a natural person.

It may, therefore, be deemed as settled that an assault is a "tortious act" as used by the Court in *Derby's* case (supra).

This rule was recognized as the law in *Davis* v. *Green*, 260 U. S. 349, brought under the Employers' Liability Act, but, as said by the Court of that case, "neither allegation nor proof present the killing as done to further the master's business or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer."

The rule, in the State of New York, as stated in the opinion of the Court of Appeals herein, was given effect in *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 547, and followed innumerable times since that case.

The general rule prevailing in cases other than negligence is set forth in 26 Cyc 1531 supported by a long array of cases and is stated as follows:

> "In respect to other torts committed by the servant there can be no question but that the master is liable at the present day, for an assault, false arrest and imprisonment, malicious prosecution, trespass, conversion or a libel, by his servant in the scope of his employment."

The law as to what constitutes scope of employment is well illustrated in numerous cases construing these words as used in the Workmen's Compensation Law of New York. Probably the leading case is *Knocks* v. *Metal Packing Corporation*, 231 N. Y. 78, 83.

Judge Chase, writing for the Court says:

> "The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment abandoned his duty and indulged in the assault as an individual act.
>
> The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment."

Having referred to the law as declared by this Court, by the Courts of the State of the State of New York and as reported in the cyclopedias to be of universal application, it may not be doubted that, at trial term, this case was properly disposed of, *unless an assault by one servant upon another in the same employ and subject to his orders, constitutes an exception to the law prevailing in all other relations between individuals.*

The decision under review did not recognize such an exception and we believe it has not been, heretofore, given support by the Courts, save in isolated, ill-considered instances.

POINT II.

The application of the so-called Fellow Servant Rule, in cases of assault, especially by one in authority upon another subject to his orders, is contrary to public policy and should not receive the sanction of the Court of last resort.

The Court of Appeals very properly stated "The cause of action having arisen upon the navigable waters of the United States, is to be disposed of under the principles of the maritime law."

If this were not true, this Court would be without jurisdiction to review the decision and the Writ of Certiorari would not have been granted.

By way of parenthesis, it will be contended under a subsequent point, that notwithstanding that the case is maritime in its nature and all the essential elements of jurisdiction, in the Court of original jurisdiction, are present and no others (*London Guarantee & A. Co.* v. *Industrial Ac. Co.*, 279 U. S. 109) the additional element necessary to confer jurisdiction here, *that the petitioner has been denied any right, privilege or immunity claimed or set up under the laws of the United States, is absent.*

The public policy of any state or nation must be and is reflected by the acts of its governing body and declared by its authorized tribunals.

As stated by the Court of Appeals in the opinion, the main argument advanced to the Court against following its own decision of more than

a third of a century ago, in *Gabrielson* v. *Wardell*, 135 N. Y. 1, was "to establish a better rule of conduct and give place to a higher degree of justice" and an effort was made to impress upon the Court, as Mr. Justice Pound says, that the authority of cases of first impression much more recent than the *Gabrielson* case, had been disregarded "in order to conform the decisions of the Court to the actualities of industrial life."

What is more natural than that both counsel and the Court, in the consideration of a purely maritime question in that behalf, should depend for both guidance and inspiration upon the Acts of Congress and the expressions of this Court?

Likewise reference was made to the activities of the Legislature of the State of New York and the decisions of the Court of Appeals of that State during the lapse of time since 1892, the date of the decision of the *Gabrielson* case, during which time the entire policy of the state as to the relation of master and servant had been changed.

The very names with which this relationship had been formerly identified had been expurgated and the reference in later statutes and decisions had been not to "master and servant" but to "employer and employee."

The Legislatures of most of the states, animated by and following Congress in its policy "directed to the safety of the men and to making compensation for injuries as properly part of the cost of the business," have not been laggard in doing likewise.

We have now, in practically every department of government, national and state, some system of compensation for personal injuries sustained by employees, within the scope of their employ-

ment, in which the negligence of employer or fellow employee plays no part.

The last system of the law into which it was, in any form, introduced was the maritime law.

The first gesture in that direction by statute, was the Seamen's Act of March 4, 1915 (38 Stat. Chap. 153, Sec. 20) where it was provided: "That in any suit to recover damages for *any injury* sustained on board vessel or in its service, seamen *having command* shall not be held to be fellow servants with those under their authority."

If the doctrine of "superior servant" had never before been recognized in the maritime law (as to shore employees see *U. P. R. R. Co.* v. *Fort*, 17 Wall 553) it was here, by duly constituted authority, imported into it in cases of "seaman on board vessel or in its service." A national policy was thus declared by the governing body of the nation so far as seamen were concerned.

In *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372, Mr. Justice McReynolds said:

> "Section 20 of the Seamans Act declares: 'Seaman having command shall not be held to be fellow servants with those under their authority; and full effect must be given this whenever the relationship between such parties becomes important.'"

Subsequently, Section 33 of the Merchant Marine Act (Masons Code, Sec. 688, Pg. 3273) was, by amendment, substituted for Section 20 of the Seamen's Act.

The purpose of this substitution was to extend rather than restrict and limit the rights and

remedies of seamen suffering personal injury or death in the course of their employment.

Such is the effect given the amendment in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375 and all the cases under the Act since decided by this Court.

One of the primary purposes of the amendment, following the *Chelentis* case, supra, was to extend the full indemnity rule of the shore servant to the servant upon the navigable waters.

That such amendment has been at all times liberally construed, so as to give expression to the full intent of Congress, has been fairly illustrated in the case of *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, where Mr. Justice Holmes said:

> "We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

In another part of the opinion it is said:

> "It is not disputed that the statutes do away with the fellow servant rule in the case of personal injuries to railway employees."

Again:

> "In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given the words of the Act * * *."

If the construction of the Seaman's, the Merchant Marine or the Employer's Liability Act was involved in this proceeding, would it be an extravagant claim to contend, in the "wider scope (which) should be given the words of the Act," the word "negligence," used in the latter, applying both to employers and co-employees, be construed as including the "misconduct" of the latter within the scope of the employment?

But the construction of neither of these statutes is in any way involved.

They were referred to, as was perfectly proper, both in the argument of counsel and the opinion of the Court of Appeals which reference and its effect will be considered under another point of this brief.

Congress, in the successive Acts relating to such rule and the Courts in construing them, have treated the rule as applicable only in personal injury to an employee resulting from negligence. The few cases in this Court where an assault, by one servant upon another in the same employ, have been considered and disposed of without reference to the relationship of fellow servants. *Davis* v. *Green*, 260 U. S. 349, *Atlantic Coast Line R. R. Co.* v. *Southwall*, 275 U. S. 64.

Is it not, therefore, a plausible inference, that the fellow servant rule never extended beyond injury from negligence and therefore never included, in its application, injury by an assault by one employee, acting within the scope of his employment, upon another who was subject to his orders?

That was the position taken by Judge Maynard of the New York Court of Appeals and concurred

in by Judges Finch and O'Brien in the dissent in the *Gabrielson* case (supra).

On page 22 of respondent's brief it is said:

> "It is not out of place to say that the prevailing opinion in the Gabrielson case in the Court of Appeals, is far less convincing than the dissenting opinion, which urges that the well established authority of the master of a vessel to use physical force in disciplining his crew, made the owner liable for a misuse of this authority. It seems to counsel, that this authority to use force, should have subjected the defendant Waydell to liability."

Counsel for respondent, through his long friendship for his adversary, has extreme satisfaction in complimenting him upon this, the only paragraph in his rather extended brief, that seems at all relevant to the question to be determined by this Court.

Judge Maynard seems to have based his argument largely upon Wood on Master and Servant, Sect. 864 which provides:

> "If he (the master) places a servant in a position of authority over other servants and makes the inferior servant subject to the direction and control of the superior, while he is not chargeable for the consequences of directions given by such superior within the scope of the general employment, yet there is no reason why he should not be chargeable to a co-servant for an abuse of such authority as much as he would be to a stranger."

In a case between the same parties, *Gabrielson v. Waydell*, brought in the Federal Court after a discontinuance in the State Court, succeeding

the reversal and direction of a new trial by the Court of Appeals, the Federal Court, 67 Fed. 342-345, said:

> "Actions upon the liability of principals for the acts done by agents placed over others are of comparatively modern origin, although the principles underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as others."

In the very recent case of *Cain* v. *Alpha S. S. Corp., et al.,* in the District Court of the U. S. for the Southern District of New York, now before this Court, Judge Mack says:

> "As to the law, I am unable to follow the Gabrielson case, 135 N. Y. 1, even though it be still regarded as the law of New York (Encarnacion v. Jamison, 230 N. Y. Supp. 16, 1928).
>
> * * * Furthermore in holding that a principal is never liable for wilful and unjustifiable assault by his agent, it is contrary to the weight of authority. * * * In my judgment the fellow servant rule has no applicability."

On appeal to the Circuit Court of Appeals Judge Mack's position was unanimously sustained. Judge Swan, of that Court, writing an opinion which was conservative, logical and forceful, every sentence of which can be endorsed without doing violence to any of the prior rulings of this Court.

In *Memphis & Newport Packet Co.* v. *Hill,* 122 Fed. 246, the syllabus is:

> "A deckhand on a steamer who has been selected by an officer in command to act as captain of the watch and to exercise au-

thority and control over other deckhands, is, for the time being, an officer of the vessel and the owner cannot avoid liability for an assault committed by him upon another deckhand while so acting, on the ground that the two were fellow servants."

In the "Sinaloa" 292 Fed. 640, where sailors upon a foreign vessel, being operated by American citizens, were subjected to abuse and one assaulted by the mate by the captain's orders and he and another were ordered from the ship, wages were held recoverable and the assaulted seaman was held entitled to recover for the assault.

In a somewhat similar situation in The Rolph, 293 Fed. 269, aff. 299 Fed. 52, sailors who were assaulted by a brutal mate were allowed to proceed in rem against the vessel, notwithstanding Admiralty Rule 16 and were awarded indemnity for their injuries.

In neither of these cases could indemnity have been recovered had the fellow servant rule applied in actions for assault.

In non-maritime cases in the State Courts, no case has been found where the fellow servant rule has been applied although several specifically repudiate it.

In *Richard* v. *Amoskeag Mfg. Co.*, 109 Atlantic 88, the Supreme Court of New Hampshire sustained a judgment against an employer obtained by an employee for an assault by his immediate superior.

The Court said:

"The same principle is applicable when the assaulted party is a co-employee, and not what is termed a third party."

In *Flemming* v. *Tarboro Knitting Mills*, 161 N. C. 435, the master was held liable for an assault by the foreman upon an employee working under him.

Lamb v. *Littman*, 128 N. C. 361, sustained a judgment wherein the injury was caused by the violent handling of the plaintiff by defendant's alter ego, in urging him to the proper performance of his work.

Alabama has given effect to the same principle in *Avondale Mills* v. *Bryant*, 10 Ala. App. 514 and *Jabeles Colias Conf. Co.* v. *Booze*, 181 Ala. 459, as has the Dominion of Canada in *Hudson Bay Co.* v. *Vaillancourt*, 2 Dom. L. R. N. S. 1008.

The Supreme Court of Mississippi has extended the rule to a foreman who assaulted an employee in an attempt to prevent a strike. *Aldin Mills* v. *Pendergraft*, 115 So. Rep. 713.

Furthermore, the very essence of the fellow servant rule is the assumption of risk the employee takes that those with whom he is called upon to work may become careless in the performance of work causing injury to his fellow and such risk is reflected in the compensation he receives for his work.

This is not true with the extraordinary risk of being assaulted or mistreated by one placed in authority over him. His contract of employment, from its very nature, implies a covenant of decent and humane treatment and public policy requires its fulfillment. The days of physical violence, as a means to hurry up work, passed in this country with the institution of slavery and nothing has since occurred in the moral or civil code to revive it.

The determination of the Court of Appeals that its former decision in *Gabrielson* v. *Waydell* was not controlling and that the trial Judge committed no error in denying the defendant's motion to dismiss the complaint upon the ground that plaintiff and his foreman were fellow servants was correct and should be affirmed.

POINT III.

The Court of Appeals did not hold or intimate that the Federal Employers' Liability Act extended the employers liability to a wilful assault of a workman by his foreman.

It is apparent from the opinion of the Court of Appeals that the extent of its decision was, as expressed therein, "Reading *Gabrielson* v. *Waydell* (supra) in the light of the Merchant Marine Act and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully spent."

In other words the national policy which led to the abrogation of the fellow servant rule in admiralty, in cases of negligence, is an indication that such rule, if ever applicable in cases of assault, is no longer in accord with such policy and should not be longer observed.

The reference to the Merchant Marine Act and its history, by way of analogy, is not only permissible but eminently appropriate and, to the mind of counsel and of the Court of Appeals, controlling on the question of law submitted for determination.

There is neither rule or reason forbidding the state Courts to refer to the federal statutes and

to the opinions of this Court in deciding questions of law, where the statutes and opinions may be useful in arriving at a conclusion that conforms with the national policies therein contained.

The primary liability of the defendant was found to rest upon the fact that the assault was committed by the foreman within the scope of his employment and in furtherance of the employer's business.

The liability having thus been arrived at, the inquiry turned to whether the employer was immune by reason of the common employment of the foreman and the man subject to his orders.

The Court of Appeals was badly handicapped by its own decision in *Gabrielson* v. *Waydell*.

If this decision remained in consonance with the present concept of the fellow servant rule it was controlling upon the Court of Appeals as it was upon the Appellate Division.

The determination of whether it was still controlling was necessarily approached as a question of maritime law.

It was recognized that the maritime law of the United States is what Congress and this Court declare it to be.

By reference to what Congress has done and this Court has said with regard to the fellow servant rule in cases of negligence within federal control, we could by analogy, readily conclude whether the rule, antiquated as it is and expressly abrogated in cases where it had originally prevailed, should now be extended to a situation where its application, in any event, is gravely doubted and where authority against it is overwhelming both in the state and federal Courts.

The Court of Appeals, no less reluctant to violate the time honored, if somewhat discredited, doctrine of *stare decisis* than other Courts of its dignity and prestige said:

> "Long and firmly established doctrines are not so easily disposed of, although the authority of recent cases of first impression has at times been disregarded in order to conform the decisions of the Court to the actualities of industrial and business life."

The Court then proceeds in its reference to the Merchant Marine Act and its history.

It does not attempt, in the slightest degree, to extend the scope of that Act to cases of assault.

Clinging, however, to its own statement of the fellow servant rule, in *Gabrielson* v. *Waydell,* it says:

> "The fellow servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope."

In reference to the Employers Liability Act it says:

> "That act, wherever applicable, read literally, imposes liability on the employer for the acts of a fellow servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included."

The N. Y. Employers Liability Law of 1921 is also referred to. That Act, as the Court says, "applies to the vice-principal rule only to cases of negligence."

Would anyone have the hardihood to contend that such reference by the Court would extend the N. Y. Employers Liability Law to cases of assault?

If not in the latter case, why in the former?

It is respectfully submitted that the question before this Court, is, solely, whether the fellow servant rule applies as between a foreman and an employee subject to his orders when the former assaults the latter within the scope of the employment and in the interest of the business in which both are engaged and not whether the Federal Employers Liability Act extends to cases of assault or other misconduct.

POINT IV.

The petitioners, under the facts of the case and the determination of the Court of Appeals, were not denied any right, privilege or immunity claimed or set up under the Laws of the United States.

Petitioners *were* denied the protection of the fellow servant rule in a case where a foreman within the scope of his employment and in furtherance of the master's business assaulted another employee who was subject to his orders.

If the assault had been made, within the scope of employment and in the interest of the business, upon a third party, the liability would have been apparent. *Phila. & R. R. Co.* v. *Denby,* supra, *Denver & Rio Grande Ry.* v. *Harris,* supra.

Petitioners present no authority and make no argument showing a difference in the rule when

the assaulted party is a fellow employee and when he is what might be termed a third party.

It is a fair implication that such authority does not exist except in *Gabrielson* v. *Waydell,* supra and the one or two expressions of minor Courts referred to by Judge Swan in *Alpha S. S. Co.* v. *Cain* now before this Court for review. The authority to the contrary, as hereinbefore set forth, is substantial.

A principle decided by this Court in *Union Pacific R. R. Co.* v. *Fort,* 17 Wall 553 seems to fairly exclude the application of the fellow servant rule in all cases of misconduct, especially upon the part of a servant placed over another.

On pages 557-558 the Court says:

> "This rule (fellow servant) proceeds on the theory that the employee in entering the service of the principal is presumed to take upon himself the risk incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligation arising out of the contract of service, and withdraw all

protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

This decision is in line with the case of *Farwell* v. *Boston etc. R. R. Corp.*, 4 Metc. 49, accredited as the leading case in the United States on the adoption of the fellow servant doctrine and the reasons therefor.

In that case it is said:

"We are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are the perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others."

Misconduct is not within the category of negligence or carelessness, is not "foreseen and provided for in the rate of compensation" and, as a logical conclusion, is not within the doctrine.

The *Farwell* case, as all the other cases, instrumental in introducing the fellow servant rule "into the common law within less than a century," recognized public policy as the true basis of the doctrine.

That policy Congress has seen proper to change "to establish a better rule of conduct and give place to a higher degree of justice," as said by the Court of Appeals.

Such change of policy may not be, and is not, confined alone to cases wherein its applicability is unquestioned but extends, as well, to those wherein its applicability is in doubt.

This Court, called upon for the first time, to determine whether the rule has heretofore been or is now applicable in cases of assault, should give due effect to the policy established by its abrogation in cases of negligence.

Should the court determine that the fellow-servant rule, under maritime law, has no application, in a situation such as is here presented, the petitioners have not been denied any right, privilege or immunity claimed or set up under the Laws of United States and the writ should not be sustained.

CONCLUSION.

The judgment of the Supreme Court entered in pursuance of the order of the Court of Appeals should be affirmed.

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